

No. 23-13670-J

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

United States of America and the State of Florida, *ex rel.* Robert V. Smith,

Plaintiffs-Appellants,

v.

Jay A. Odom and Okaloosa County Board of County Commissioners,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

No. 3:20-cv-3678-MCR-ZCB

**APPELLEE OKALOOSA COUNTY BOARD OF COUNTY
COMMISSIONERS' ANSWER BRIEF**

CARLY J. SCHRADER
GREGORY T. STEWART
LYNN M. HOSHIHARA
KERRY A. PARSONS
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070

Attorneys for Appellee
Okaloosa County, Board of County
Commissioners

No. 23-13670-J
United States of America v. Jay A. Odom

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

In accordance with 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, undersigned counsel for Appellee, OKALOOSA COUNTY, BOARD OF COUNTY COMMISSIONERS, hereby certifies that the following individuals and entities have an interest in the outcome of this appeal:

- A. Beard, Amelia Hallenberg
- B. Billheimer, Elizabeth C.
- C. Bolitho, Zachary C.
- D. Boyles, Nathan
- E. Goodwin, Trey
- F. Gordon, III, Alfred Benjamin
- G. Hoshihara, Lynn M.
- H. Hunt, Nathaniel H.
- I. Izzo, Anne Nicole
- J. Ketchel, Carolyn
- K. Kirsch, Peter J.
- L. Knight, Christopher A.
- M. Mixon, Paul

No. 23-13670-J
United States of America v. Jay A. Odom

N. Odom, Jay A.

O. Okaloosa County Board of County Commissioners

P. Parsons, Kerry A.

Q. Patronis, Jimmy

R. Ponder, Mel

S. Richard, Barry

T. Rodgers, M. Casey, U.S. District Judge

U. Schofield, Michael J.

V. Schrader, Carly J.

W. Shaud, Matthew Reed

X. Smith, Robert V.

Y. Sobotkin, David M.

Z. State of Florida, The

AA. Stewart, Gregory T.

BB. United States of America

CC. Wilbanks, Sarah

No. 23-13670-J
United States of America v. Jay A. Odom

It is certified that no publicly traded company or corporation has an interest
in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, the Okaloosa County Board of County Commissioners, does not request that the Court hear oral argument in this matter.

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
STATEMENT REGARDING ADOPTION OF BRIEF OF OTHER PARTIES	iv
STATEMENT OF THE ISSUE(S).....	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
CONCLUSION.....	6
CERTIFICATE OF COMPLIANCE	8
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

	Page(s)
Cases	
<i>Corsello v. Lincare, Inc.</i> , 428 F.3d 1008 (11 th Cir. 2005).....	5
<i>United States v. HPC Healthcare, Inc.</i> , 723 F. Appx. 783 (11 th Cir. 2018).....	5
<i>Universal Health Services, Inc. v. U.S.</i> , 579 U.S. 176 (2016).....	5
<i>Urquilla-Diaz v. Kaplan Univ.</i> , 780 F.3d 1039 (11 th Cir. 2015).....	5
Florida Statutes	
§§ 68.081-68.092	2
Rules	
Fed. R. Civ. P. 9(b)	1, 3
Statutes	
31 U.S.C. §§ 3729	2
31 U.S.C. §§ 3729-3730	5
31 U.S.C. §§ 3730(e)(4)(B)	6

STATEMENT REGARDING ADOPTION OF BRIEF OF OTHER PARTIES

Appellee Okaloosa County, Board of County Commissioners, hereby adopts by reference and joins in the Statement of Fact and the Argument sections of the Appellee's Brief of Jay A. Odom, as applicable to the claims raised against the County.

STATEMENT OF THE ISSUE(S)

- I. Whether the District Court correctly determined the public disclosure bar of the FCA precludes Smith's claims, and he is not an original source?
- II. Whether the District Court correctly determined that Smith failed to state a claim and that the claim lacked sufficient particularity under Federal Rule of Civil Procedure 9(b)?
- III. Whether the District Court correctly dismissed the amended complaint with prejudice?

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

Appellants, Plaintiffs below, the United States of America and The State of Florida ex rel. Robert V. Smith filed the Amended Complaint in camera and under seal against the Appellees, Defendants below, Jay A. Odom and Okaloosa County, Board of County Commissioners (“the County”), under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and the Florida False Claims Act, §§ 68.081-68.092, Fla. Stat., (collectively the “FCA”) (Doc. 33). Both the United States and the State of Florida declined to intervene as a Plaintiff, and thereafter the Amended Complaint was unsealed. (Doc. 50).

Odom filed a timely Motion to Dismiss the Amended Complaint along with a Memorandum in Support and Request for Judicial Notice. (Docs. 55, 56, 57). The County adopted and joined in Odom’s Motion to Dismiss and Memorandum in Support in full. (Doc. 59). The Motion to Dismiss asserted five reasons why the Amended Complaint should be dismissed, which were summarized as follows:

1. The FCA’s public disclosure bar prohibits these claims because Relator relies on publicly disclosed information and is not an original source.
2. The submissions to the Government were not false or material as a matter of law, and the Government knew or should have known of the facts underlying Relator’s Amended Complaint prior to approving the grants.

3. Relator failed to state a claim with particularity, including failing to state how the Government was misled by any alleged false claim or submission.

4. Relator's claims, which are premised on events prior to February 24, 2014, are barred by the statute of limitations.

5. Relator's Florida FCA claim is barred by the public disclosure provision for the separate reason that Relator failed to disclose the information to the State of Florida prior to its public disclosure in the original Complaint.

(Doc. 56 at 3-4).

On June 22, 2023, the United States District Court, Northern District of Florida (“District Court”), entered its Order granting the Motion to Dismiss. (Doc. 76). In its thorough and lengthy order, the District Court found that the public disclosure bar of the FCA precluded Smith from bringing the action under the FCA and that Smith did not meet the original source exception. (Doc. 76 at 16-20). The District Court also determined that the Amended Complaint failed to state a claim with sufficient particularity as required by the FCA and the Federal Rule of Civil Procedure 9(b). (Doc. 76 at 20-25). Thereafter, Smith filed a Motion to Amend the Judgment. (Doc. 77). Odom filed a Response in Opposition, which was adopted in full and joined by the County. (Docs. 78, 79). This appeal followed.

(ii) Statement of the Facts

Appellee, Okaloosa County Board of County Commissioners specifically adopts by reference the Facts as set forth in Appellee's Brief of Jay A. Odom, pages 8-9, which is equally applicable to the County.

SUMMARY OF THE ARGUMENT

The Amended Complaint was properly dismissed with prejudice by the District Court, as the Amended Complaint failed to state a claim of violation of the FCA, 31 U.S.C. §§ 3729-3730. As set forth in the Argument section of Appellee's Brief of Jay A. Odom, adopted by reference herein, the Amended Complaint fails to allege the requisite element of materiality with particularity. *See Universal Health Services, Inc. v. U.S.*, 579 U.S. 176 (2016). Second, the Amended Complaint fails to set forth allegations of fraud which "state with particularity the circumstances constituting fraud." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039 (11th Cir. 2015). The Amended Complaint fails to set forth the requisite details necessary to support the claim and makes a number of allegations "on information and belief." As the District Court determined, such allegations lack the necessary "indicia of reliability" because they fail to provide the underlying basis for the assertions. *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005); *United States v. HPC Healthcare, Inc.*, 723 F. Appx. 783 (11th Cir. 2018).

In issuing its Order below, the District Court correctly ruled that the public disclosure bar applies, requiring dismissal of the claims against Odom and the County, and in determining Smith is not an original source. The FCA requires dismissal if the disclosed information is "substantially the same" as the information

appearing in news media. In this case, there is a significant overlap between Smith's allegations and the public disclosure reflected in the news articles from March and May 2014. In addition, although he claims to be an original source, Smith has not alleged sufficient facts supporting the "independent" knowledge required by 31 U.S.C. §§ 3730(e)(4)(B). Lastly, the District Court correctly dismissed the Amended Complaint with prejudice for the reasoning set forth within its Order.

ARGUMENT

The Appellee Okaloosa County, Board of County Commissioners specifically adopts by reference and joins in the Argument including citations of authority as set forth in Appellee's Brief of Jay A. Odom, as to all Sections I-III of the Argument, pages 9-22, as applicable to the claims raised against the County.

CONCLUSION

For the reasons as set forth in the Appellee's Brief of Jay A. Odom, as adopted by referenced herein, Appellee Okaloosa County Board of County Commissioners respectfully requests the Court affirm the decision of the District Court in all respects.

Date: February 12, 2024

s/ Carly J. Schrader

CARLY J. SCHRADER
Florida Bar No. 14675
GREGORY T. STEWART
Florida Bar No. 203718
LYNN M. HOSHIHARA
Florida Bar No. 41194
KERRY A. PARSONS
Florida Bar No. 91919
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070
(850) 224-4073 (Facsimile)
cschrader@ngnlaw.com
gstewart@ngnlaw.com
lhoshihara@ngnlaw.com
kparsons@ngnlaw.com
legal-admin@ngnlaw.com

Attorneys for Appellee
Okaloosa County Board of County
Commissioners

CERTIFICATE OF COMPLIANCE

Undersigned counsel for Appellee OKALOOSA COUNTY, BOARD OF COUNTY COMMISSIONERS, hereby certifies that this Answer Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel further certifies that the Answer Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in or proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font size and type style.

s/ Carly J. Schrader

CARLY J. SCHRADER

Attorneys for Appellee

Okaloosa County Board of County
Commissioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following, on this 12th day of February 2024.

By Electronic Case Files (ECF) Notice to:

ELIZABETH C. BILLHIMER, ESQUIRE
Clark Partington Hart
4100 Legendary Drive, Suite 200
Destin, Florida 32541
(850) 650-3304
(850) 650-3305 (Fax)
ebillhimer@clarkpartington.com
fkendall@clarkpartington.com
bgilman@clarkpartington.com
ATTORNEY FOR APPELLANTS,
USA AND THE STATE OF FLORIDA,
EX REL. ROBERT V. SMITH

A. BENJAMIN GORDON, III, ESQUIRE
Anchors Gordon, P.A.
2113 Lewis Turner Blvd., Suite 100
Fort Walton Beach, FL 32547
(850) 863-1974
(850) 863-1591 Facsimile
bgordon@anchorgordon.com
aizzo@anchorgordon.com
cyndi@anchorgordon.com
mary@anchorgordon.com
COUNSEL FOR APPELLEE
JAY A. ODOM

DAVID M. SOBOTKIN, ESQUIRE
U.S. Department of Justice
Civil Division, Fraud Section
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044
(202) 353-1291
david.m.sobotkin@usdoj.gov
ATTORNEYS FOR APPELLANT
UNITED STATES OF AMERICA

BARRY RICHARD, ESQUIRE
Barry Richard Law Firm
101 East College Avenue, Suite 400
Tallahassee, Florida 32301
(850) 251-9678
barryrichard@barryrichard.com
COUNSEL FOR APPELLEE
JAY A. ODOM

By U.S. Mail to:

CHRISTOPHER A. KNIGHT
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
Christopher.Knight@myfloridalegal.com
COUNSEL FOR APPELLANT
STATE OF FLORIDA

JIMMY PATRONIS, Chief Financial Officer
Florida Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

s/ *Carly J. Schrader*
CARLY J. SCHRADER